IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. .....

MASSACHUSETTS MUTUAL LIFE INSURANCE CAMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURTS BELOW.

The findings and opinion of the Securities and Exchange Commission (R. p. 8) are set forth in the Commission's Holding Company Act Release Nos. 5062 and 5071. The opinion of the United States District Court for the Eastern Division of Missouri (R. p. 98) is reported in 57 F. Supp. 997. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 206) is reported in 151 F. (2d) 424.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered October 30, 1945 (R. p. 220). The Petition for Rehearing was denied November 28, 1945 (R. p. 265). The jurisdiction of this Court is involved under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA Sec. 347, 8 F. C. A. Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 USC Sec. 79a et seq.).

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 8 to 17, for statement.

ARGUMENT.

I.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is Probably in Conflict With Applicable Decisions of This Court in Three Different Respects.

(1) Possible bankruptcy is not a factor to be considered in determining what is the fair and equitable equivalent of the rights of bondholders and the Circuit Court of Appeals in holding that possible bankruptcy is a factor to be considered is probably in conflict with the decisions of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123.

In Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123, the Court held that foreclosure and liquidation under Sec. 77B could "have no relevant bearing on whether a proposed plan is 'fair and equitable'" and that "Submission to coercion is not the application of 'fair and equitable' standards."

In its "Findings and Opinion" in the instant case the Securities and Exchange Commission said (R. p. 45):

> "We are of the opinion that retirement of the 1919 bonds at principal amount plus accrued interest to the effective date of the plan constitutes fair and equitable treatment for the holders of those bonds. Laclede Gas, as we have heretofore observed, absent the plan, is in serious danger of defaulting on its first mortgage bonds less than a year hence. There is this serious danger that Laclede Gas would go into bankruptcy, were it not for the reorganization provisions of Section 11 of the Act. Aside from the practical hardship commonly suffered by senior security hold-

> ers during the course of an extended bankruptcy proceeding, the maturity of the 1919 bonds would doubtless be accelerated in the course of such a proceeding and thus their claim in the reorganization would be measured by the principal amount, exclusive of the redemption premium."

The Commission did not find that, absent reorganization, bankruptcy was inevitable; it stated that there were "possibilities of bankruptcy" (R. p. 35).

At the enforcement proceeding in the District Court, the petitioner herein, Massachusetts Mutual Life Insurance Company, both in its objections (R. p. 96) and its argument (R. p. 116) objected to the use of the results of possible bankruptcy as a standard of fairness and equitableness. The District Court quoted (R. p. 115) with approval the findings of the Commission and stated (R. p. 116):

> "If the protection of the value of the 1919 bonds were the sole problem before the Commission, perhaps the Commission could take the cold, detached position of objectors, but fortunately for others who have rights in the premise, such is not the case."

Before the Circuit Court of Appeals petitioner again objected to the use of what the bondholders would receive in bankruptcy as determinative of what they ought fairly and equitably to receive in a Section 11 proceeding. The Circuit Court of Appeals said (R. p. 215):

> "In applying the rule of equitable equivalence the Commission observed that owing to the excessive indebtedness of Laclede Gas and the imminent maturity of its first mortgage bonds there is serious danger of default on those bonds and of bankruptcy. These dangers and their consequences are averted only because of the reorganization provisions of Section 11 of the Act."

The Circuit Court of Appeals went on to say (R. p. 216):

> "Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered.'"

It is thus clear that the Circuit Court of Appeals was of the opinion that what the Commission found that the 1919 bondholders would receive in bankruptcy, i. e., the principal and accrued interest, was the equitable equivalent of the rights surrendered by the 1919 bondholders and limited the amount to which they were entitled. It is submitted that this position is in conflict with the decision of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106.

In Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, this Court stated that the term "fair and equitable" as used in the Public Utility Holding Company Act of 1935 incorporates the principle of full priority and Case v. Los Angeles Lumber Products Co., supra, was cited as an application of the full priority doctrine. In Case v. Los Angeles Lumber Products Co., this Court held that whether or not bondholders would fare worse under bankruptcy could "have no relevant bearing on whether a proposed plan is 'fair and equitable.'" This Court said, 308 U. S. 106, 123:

> "The fact that bondholders might fare worse as a result of foreclosure and liquidation than they would by taking a debtor's plan under Sec. 77B **can have no relevant bearing on whether a proposed plan is 'fair and equitable'** under that section. **Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition** would not only dras-

> tically impair the standards of 'fair and equitable' as used in Sec. 77B; it **would pervert the function of the Act.**" (Emphasis supplied.)

As in the Los Angeles Lumber Products Co. case, so here too, such a proposition "would pervert the function of the Act." The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of this Court in the Los Angeles Lumber Products Co. case, and that decision is applicable here.

(2) **The refusal of the District Court to resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co. extended to the electric properties and the failure of the Circuit Court of Appeals to reverse the District Court because of such failure is in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523.**

In Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523, this Court held that a District Court should resolve a dispute as to the extent of a lien in order to determine the fairness of a plan. This Court said at l. c. 568-569:

> "The General Mortgage bonds contend here, as they did before the Commission, that they have a first lien on those properties by reason of the after-acquired property clause in their mortgage. The Commission credited the 50-year bonds with the earnings from those properties, indicating however that the propriety of doing so was doubtful in absence of a judicial determination of the question. Some of the General Mortgage bonds objected to that allocation before the District Court. The District Court, however, did **not** undertake to resolve the dispute. These General Mortgage bondholders likewise raised

the point before the Circuit Court of Appeals. But it was not considered there * * *. **Here as in the Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute.**" (Emphasis supplied.)

But let us consider the instant case. The Trustee of the 1919 bonds has at all times contended that the lien of the mortgage underlying these bonds extends to the property of Laclede Electric, including the improvements made thereon. (R. p. 32.) On the question of the lien the Securities and Exchange Commission said (R. p. 45):

> "Solution of Ogden's problems under Section 11(b) of the Act also necessitates retirement of the Laclede Gas 1919 bonds. Ogden has been ordered under Section 11 (b) to divest itself of its interests in Laclede Gas and Laclede Electric. However, as we have noted, so long as there is dispute between Laclede Electric and the Trustee under the 1919 bonds as to the extent of the lien, the securities of Laclede Electric or its properties are not in salable form. A purchaser thereof would simply be buying a law suit. * * * Thus, we believe that the retirement of the 1919 bonds, with its consequent elimination of the dispute as to the extent of the lien on the electric properties, is necessary to enable Ogden to divest itself of its interests in the two companies in a feasible manner."

The Commission did not determine the value of the lien. There was no determination of what the assets were subject to the payment of the respective claims. Instead, the Commission took the position that it would **eliminate** "the dispute as to the extent of the lien" by forcing retirement of the bonds and that Ogden, the holding company, would then be paid $6,175,000 for this

property, and Ogden in turn would exchange this sum, along with $905,000 cash and $2,000,000 collateral trust notes, for 2,000,000 shares of the new stock which Laclede Gas would issue. (R. p. 75.) In other words, there was no determination at all as to what assets were available to the bondholders. Instead, that part of the assets were given outright to junior security holders. The bondholders, of course, objected to this. (R. p. 95.) The District Court, however, said (R. p. 114):

> "That it (the Commission) has seen fit to order a procedure that will eliminate a lien claim on certain property and as a result of its act thereby remove a possible cause of loss to stockholders of the company owning that property, does not condemn its act in our opinion.
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> * * * * * * *
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> "But, the objectors assert, there is no ground for dispute as to the lien securing the 1919 Bonds covering certain property of Laclede Electric. Sufficient to answer that the Commission finds there is a dispute as to the lien coverage. Litigation was at one time started on the question. Certainly this Court cannot now try that collateral issue.
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> " * * * We repeat that the holding of the Commission, that such a dispute (not the basis therefor) exists is not controverted and we are not in a position to try the merits of the respective claims of lien or no lien."

The District Court thus lightly dismissed as a "collateral issue" the very factor which this court has held to have "a direct bearing on the fairness of the plan". As in the Group of Institutional Investors case, so here too "The District Court should resolve the dispute".

The Circuit Court of Appeals did not consider this question, and did not discuss it at all, even though it was specifically raised by this petitioner (see particularly the

Petition for Rehearing, R. p. 221). The Circuit Court of Appeals, instead of considering this question, merely treated the electric properties apart from any dispute as to a lien. It said (R. p. 217): "If we assume that at the beginning of this proceeding both the common and the preferred stock, with its dividend arrears, of Laclede held by Ogden had little or no value, still for the 2,000,000 shares of new stock of the aggregate par value of $8,000,000 it surrenders to Laclede Gas cash and 6% collateral trust notes of the aggregate value of $9,000,000." The fact is that $6,175,000 of the $9,080,000 was the cash proceeds of the Laclede Electric properties which were sold and which the Commission alloted to Laclede Electric. It was these properties about which there was a dispute. Ogden had no clear title to them. The lien of the mortgage underlying the 1919 bonds came ahead of any rights of the stockholders of Laclede Electric. It was these properties about which there was the dispute. Ogden had no clear title to them. Totally ignoring this lien claim, the Circuit Court of Appeals sanctioned the giving to Ogden of $6,175,000 cash to which it was not entitled. Ogden then exchanged this cash, along with a surrender of its notes and $905,000 for $8,000,000 worth of new stock. In this manner Ogden is being highly compensated and preferred, all of which is in derogation of the rights of senior security holders and of the requirements of the absolute priority doctrine as enunciated by this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., supra, where it was held that the District Court should resolve a dispute as to the extent of a lien.

There is no doubt that the full priority doctrine and the holding that a District Court should resolve a dispute as to the extent of a lien is applicable to a proceeding under Section 11 of the Public Utility Holding Company Act of 1935; such as this proceeding is. This was settled by this Court in Otis & Co. v. Securities & Exchange Commission,

323 U. S. 624. It is submitted, therefore, that the decision of the Circuit Court of Appeals is also in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., supra.

(3) **The full priority doctrine which has been established by this Court in numerous cases was further misconstrued and misapplied by the Circuit Court of Appeals in conflict with the decisions of this Court in that the Circuit Court of Appeals found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100.**

The full priority doctrine as developed by this Court gives substantive meaning to the words "fair and equitable" as used in Section 11 (b) (2) and 11 (e) of the Public Utility Holding Company Act of 1935. This meaning can be gathered from the following opinions by this Court.

In Case v. Los Angeles Lumber Co., 308 U. S. 106, this Court said at l. c. 115:

> "The words 'fair and equitable' as used in §77B (f) are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, Duparquet Huot & M. Co. v. Evans, 297 U. S. 216, 80 L. ed. 591, 56 S. Ct. 412, 30 Am. Bankr. Rep. (N. S.) 329, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. Keck v. United States, 172 U. S. 434, 446, 43 L. ed. 505, 510, 19 S. Ct. 254. In equity reorganization law the term 'fair and equitable' included, inter

alia, the rules of law enunciated by this Court in the familiar cases of Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Louisville Trust Co. v. Louisville, N. A. & C. R., 174 U. S. 674, 43 L. ed. 1130, 19 S. Ct. 827; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 S. Ct. 554; Kansas City Terminal R. Co. v. Central Union Trust Co., 271 U. S. 445, 70 L. ed. 1028, 46 S. Ct. 549. These cases dealt with the precedence to be accorded creditors over stockholders in reorganization plans. In Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 674, 43 L. ed. 1130, 19 S. Ct. 827, supra, this Court reaffirmed the 'familiar rule' that 'the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors.' And it went on to say that 'any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.' "

This doctrine of absolute priority that the rights of senior security holders are protected from invasion by junior security holders is well established. It is not enough that senior security holders receive an equivalent to the face amount of their claims, they must also receive compensation for the loss of their senior rights. Thus, it is said in Group of Institutional Investors v. Chicago, St. P. & P. Ry. Co., 318 U. S. 523, 569-571:

"Hence, as we indicated in the Consolidated Rock Products Co. Case, where junior interests participate in a plan and where the senior creditors are allotted only a face amount of inferior securities equal to the face amount of their claims, they **'must receive, in addition, compensation for the senior rights which they are to surrender.'** 312 U. S. 529, 85 L. ed. 995, 61 S. Ct. 675, 45 Am. Bankr. Rep. (N. S.) 79. And we stated that whether they should 'be made whole for the change in or loss of their seniority by an increased

participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case.' Id. 312 U. S., p. 529, 85 L. ed. 995, 61 S. Ct. 675, 45 Am. Bankr. Rep. (N. S.) 70. We felt that that result was made necessary by the ruling in the Boyd case that, 'If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control.' 228 U. S., p. 508, 57 L. ed. 943, 33 S. Ct. 554. We adhere to that view. Unless that principle is respected, there will be serious invasions of the rights of senior claimants to the benefit of the junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority."

* * * * * * *

"Our conclusion on the point is that, since junior interests are participating in the plan, **the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old one, as equitable compensation, qualitative or quantitative for the loss of their senior rights.**" (Emphasis supplied.)

Nor is it enough that the relative priorities between the various security holders is maintained. Even though this is done, there still must be full compensatory provision "for the entire bundle of rights which the creditors surrender." In Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, this Court said at l. c. 527-528:

"True, the relative priorities are maintained. But the bondholders have not been made whole. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in

part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. **Those lost rights are of value. Full compensatory provision must be made for the entire bundle of rights** which the creditors surrender." (Emphasis supplied.)

And at l. c. 528-529:

> "Thus it is plain that while creditors may be given inferior grades of securities, their 'superior rights' must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating, in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. **They must receive, in addition, compensation for the senior rights which they are to surrender.** If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The plan then becomes within judicial denunciation because it does not recognize the creditors' 'equitable right to be preferred stockholders against the full value of all property belonging to the debtor corporation.' Kansas City Terminal R. Co. v. Central Union Trust Co., supra (271 U. S., p. 454, 70 L. ed. 1032, 46 S. Ct. 549)." (Emphasis supplied.)

It is essential to know the nature of the contractual rights of the 1919 Bondholders in order to determine whether they will, under the plan, receive full compensation for the senior rights which they are surrendering. It is also essential to know how the various classes of security holders are treated under the plan.

As of December 31, 1943, Laclede Gas had outstanding $17,500,000 of bonds of Series "C" (due February 1, 1953) and $5,500,000 of bonds of Series "D" (due February 1, 1960) of the First Mortgage Collateral and Refunding 5½% Gold Bonds (both of which have been referred to herein as the "1919 bonds") issued under the mortgage

executed by Laclede Gas on January 1, 1919 (R. p. 13). The mortgage securing the 1919 Bonds provides that such bonds "may be redeemed by the Company at any time at par and accrued interest and such premiums, if any, as the Board of Directors may determine at the time of the issuance of said bonds" (R. p. 42). There is no other provision for acceleration of maturity. The redemption premium on the Series C bonds due 1953 was 2% during 1944 and the premium on the Series D bonds is 4% during 1944, aggregating $570,000 (R. p. 42). If the bonds were not called prior to maturity, the bondholders would from January 1, 1944, to maturity receive in excess of $4,500,000 as interest on the bonds.

This right of interest to maturity date is a valuable senior security right. The petitioner is an insurance company which must determine its investment policies with great care in order to protect the interests of its numerous policyholders. In these bonds the appellant has a valuable investment which guarantees a return of 5½% until the maturity date of the bonds, except that the mortgagor may redeem the bonds prior to maturity upon the payment of specified redemption premiums. Absent a redemption provision in the contract, the bondholder has a right to refuse the payment of the principal at any time before maturity date and has a right to demand the payment of interest to the maturity date. Missouri, K. & T. Ry. Co. v. Union Trust Co. of New York, 156 N. Y. 592, 51 N. E. 309.

The District Court below did not consider at all the right of the bondholders to interest to maturity date. It considered conclusive upon it the Commission's determination that what the bondholders would receive in bankruptcy, that is, principal amount plus accrued interest, was the fair equivalent of the rights of the 1919 Bondholders (R. p. 134). The Circuit Court of Appeals found no error in this (R. p. 216). The Circuit Court of Appeals went further and said (R. p. 216):

"Appellant contends further that the plan is inequitable in that the Commission has not fairly subordinated the rights and interests of the stockholders and junior creditors to the superior rights of the bondholders. In support of this contention it is insisted that fair and equitable treatment under the plan as compared with the treatment of Ogden, owner of most of the Laclede Gas and Laclede Electric stock and a junior creditor of both corporations, would entitle the holders of the 1919 bonds to interest on their bonds until their maturity date or to reasonable compensation for reinvestment expenses.

"* * * The due date fixed in the contract in this case can not be urged, however, as the basis for a claim for interest payments. When the retirement of bonds is compelled by an Act of Congress in the furtherance of a legitimate public policy, contract provisions standing in the way of the consummation of that policy must yield to the public good and are illegal."

In addition to the fact that bondholders are not being compensated for the loss of their senior rights, the stockholders' interests are being greatly enhanced. In the words of the Commission (R. p. 38): "* * * The plan confers distinct benefits upon Ogden in converting its nonmarketable securities in the Laclede companies into marketable securities with substantial applicable earnings and immediate dividend prospects." The stock has been non-dividend paying for over 11 years and absent a plan would not pay dividends for many years to come (R. p. 17). Under the plan common stock will receive share for share a new common stock having reasonably prospective earnings of between 37¢ and 41.1¢ per share (R. p. 37). The preferred stock will receive 14 shares of the new common stock having between $5.18 and $5.75 of reasonably prospective earnings as compared with its annual $5.00 dividend preference, and the preferred stock as a class would have applicable to it between $120,849 and $134,241 as compared

with its total annual dividend preference of $116,650 (R. p. 37).

The Public Utility Holding Company Act of 1935 was enacted by Congress to control and police the activities of holding companies because Congress found that holding company operations, as they operated theretofore, were an evil inimical to the welfare of the country (Public Utility Holding Company Act of 1935, Sec. 1). The control of public utilities lie in the stockholders **not in the bondholders** who have no voice in the management of the utilities. It is through the control of stock that public utilities were able to exert their evil influences, which Congress sought to prevent. If there is any cost or price to pay for the policing or controlling of holding companies, it should be borne by the stockholders who are responsible for the management of the company, **and not by the bondholders who are not responsible for the management of the company.** In the instant case, however, it is the bondholders who are forced to sacrifice and to pay the costs of eliminating the holding company. At the same time the stockholders will receive "substantially superior" (R. p. 39) stock in lieu of their unmarketable stock and Ogden, the condemned holding company, receives "distinct benefits" (R. pp. 38-39).

As pointed out in the Consolidated Rock Products case, 312 U. S., l. c. 527-528, a reduction in interest makes an inferior security; the necessity of re-investing a 5½ per cent security on a 3½ per cent or lower market makes a much inferior investment.

This Court said in Group of Institutional Investors v. Chicago M. & St. P. & P. Ry., supra:

> "* * * they (senior creditors) 'must receive, in addition, compensation for the senior rights which they are to surrender' * * *. Unless that principle is respected, there will be serious invasions of the

rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority."

The very thing this Court warned against in that case has come to pass in the instant case.

The inequity and unfairness of the standard applied in the instant case is, oddly enough, graphically revealed in a ruling and opinion of the Securities and Exchange Commission after the decision of the Circuit Court of Appeals in the instant case (but before the Petition for Rehearing at which time it was called to the Court's attention [R. p. 253]).

That case was In the Matter of American Power & Light Company, which appears in Report No. 152 of C. C. H. Federal Securities Law Service, Par. 75,592, issued November 13, 1945. American Power & Light Co. (a holding company) was ordered to dissolve and liquidate. The company proposed a plan which called for payment of debentures at 100 and accrued interest. The Commission disapproved the plan and held that to be fair and equitable, 100 plus the call premium of 10 must be paid. The doctrine of earlier cases (specifically New York Trust Company v. Securities and Exchange Commission, 131 F. (2d) 274, and City National Bank & Trust Co. v. Securities and Exchange Commission, 134 F. (2d) 65, that 100 was fair and equitable whenever a holding company was ordered dissolved) was repudiated. The New York Trust Co. and the City National Bank & Trust Co. cases were decided on the basis that the "continued existence (of the Company) was made impossible" by order of the Commission and that the debenture agreements "contemplated as indispensable the continued existence of the corporation." It should be noted that the Commission under Section 11 of the Act has the power to order holding com-

panies to dissolve and go out of existence, but that because of the exception clause of Section 11 (b) (2) it has no such power as to operating companies such as Laclede Gas. Since the Commission could not, and does not in the instant case, order the dissolution of Laclede Gas the reasoning of the holding company cases, even if otherwise valid, would not apply to Laclede Gas.

In its opinion in the American Power & Light Company case, the Commission makes a confession and repudiates the position that it had theretofore taken. The Commission there says:

> "We believe that any statements in our early opinions and in our briefs to the courts in such cases which could lead to the conclusion that 100 is payable under any or all circumstances should not be followed because of the obviously inequitable results that such a rule would produce."

This statement leaves no doubt that the Commission had theretofore taken the position that 100 was payable under any and all circumstances and, as we will show, the instant case was one of those cases. The full import of this repudiation can be appreciated only when considered in light of the development of the case and the doctrine. In stating the facts and analyzing prior cases which inevitably led to this repudiation, the Commission clearly reveals that the facts in the instant case make the position of the Circuit Court of Appeals untenable. We are not implying that the Commission is a superior judicial body (indeed the petitioner has contended, and still does contend, that the District Court abandoned to the Commission its judicial function), but the District Court and the Circuit Court of Appeals both treated the Commission as a body of experts whose judgment must be respected without question on such matters. Since the "body of experts"

upon which the Circuit Court of Appeals placed implicit reliance has shifted its position the opinion of that Court is suspended in a void and is without foundation. The reasoning of the Courts being that of the Commission, and the Commission having discredited its own reasoning, ergo the Court's reasoning is likewise discredited.

Let us now examine the opinion of the Commission In the Matter of American Power & Light Company. In that case American Power & Light Company (American) filed an application pursuant to 11 (e) of the Act to obtain approval of a plan. The plan proposed to retire American's outstanding 6% Gold Debenture Bonds, due 2016, and Southwestern Power & Light Company's (Southwestern) 6% Gold Debenture Bonds, due 2022, assumed by American, at 100% of principal amount plus accrued interest. American is a holding company, and not an operating utility, which the Commission had ordered to liquidate and dissolve (Electric Bond & Share Company et al., Holding Company Act Release No. 3750). The debenture agreements provided that the debentures could be redeemed on any interest date, but only if the entire issue were redeemed at 110%. In that case there was no question as to the necessity of retiring the debentures, as there is in the instant case, for the reason that American had been ordered to dissolve and liquidate. This the Commission could so order because American is a holding company; the Commission, however, has no such power as to Laclede Gas, an operating utility. Consequently, the fundamental question before the Commission was that of the fairness of the plan.

At the outset the Commission was confronted with the well established principle that the absolute priority doctrine applied to an 11 (e) proceeding, that each security holder in the order of his priority must receive "from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." What are

the rights surrendered? "The rights of the debenture holders are ascertained by reference to the contractual provisions in the indenture."

The Commission then observed that since American had been ordered to dissolve, the debentures were not entitled to receive the call premium as such. The call provision not being applicable, "The pertinent rights of the debentures which should be satisfied under Section 11 (e) must therefore be ascertained by reference to the remaining provisions of the contract. These rights include **the interest rate, the maturity date,** and all the other provisions of the contract." In other words, the Commission's position is that if the call provision is not applicable (except for establishing a maximum price), then the amount of interest the debt holder would receive to maturity is a right for which compensation must be paid. In the case of Laclede Gas the amount of such interest would be over $4,500,000.

The Commission well illustrates this position in answering the contention that in dissolution cases the payment of the face value prevailed in all cases. It said:

> "The application of a mechanical rule that all prepayments of debt in Section 11 (e) plans must be at the face amount of the debt claim would operate capriciously and might produce a windfall for one class of security holders at the expense of another. For example, if American's debentures, with their maturity 71 years distant, bore a contract interest rate of 8% whereas an interest rate of 4% would be the current rate for comparable obligations and would adequately measure the debenture holders' risk. **It would be highly detrimental to the value of the debenture holders' present rights if it were paid off at this time by retirement at 100.** By hypothesis, the debenture would be worth 100 if the interest rate were only 4%; the extra 4% interest makes the debenture worth

substantially more than 100 and payment at 100 deprives the debenture holders of the value of his right to receive the extra 4% for each of the 71 years until maturity. The stockholder, by the same token, would be relieved of his disadvantageous contract which would require him for 71 years to pay 4% extra interest each year than he would have to pay for funds currently raised by selling otherwise similar debentures. **Payment at principal amount would thus deprive the debenture holder of substantial value, and transfer such value to the stockholders giving them a windfall.**

"* * * **The principal determinant of values of such securities is the right to receive interest rather** than the amount of the principal claim. * * *

"It is clear, therefore, that if we follow American's contentions, the carrying out of Section 11 will result in substantial injustices to security holders. **Such a result is contrary to the Congressional intention manifest in Section 11.**" (Emphasis supplied.)

If that reasoning is applied to the facts of Laclede Gas it becomes clear that the plan does operate capriciously and does create a windfall for the stockholders at the expense of the 1919 bondholders. The 1919 bonds were 5½% bonds. Under the plan they would be redeemed at par. Then, Laclede Gas issued new bonds and debentures. The new bonds, in the amount of $19,000,000, sold at a coupon rate of 3½% with a small premium and the debentures sold at 3⅛%, making a saving to the stockholders (and a loss to the bondholders if they bought the new bonds and debentures) of over 2% per annum (10 Federal Register 3119). Thus a substantial injustice is done the 1919 bondholders. Neither the Commission, the District Court nor the Circuit Court of Appeals applied this standard (although it was presented to them by petitioner) to the instant case, and yet this standard must be applied if a "result contrary to the Congressional intention" is to be avoided.

As one would well know and as stated in its opinion, the position taken by the Commission in the American Power & Light Company case constituted a drastic deviation from its prior decisions. Consequently the Commission had great difficulty with those decisions, particularly in United Light & Power and North American Light & Power (which subsequently became New York Trust Co. v. S. E. C., 131 F. [2d] 274, and The City National Bank and Trust Company v. S. E. C., 134 F. [2d] 65). The difficulty was so great that the Commission was literally forced to repudiate the reasoning in those cases. The process of repudiation is interesting. First, the Commission states that those cases primarily held that the retirement of the bonds was compelled by Section 11 and was not therefore the kind of optional calling by the company which brought the redemption premium provisions into operation. As we have already pointed out this was because the companies, the indispensable factors, were being compelled to go out of existence, which is not the case of Laclede Gas. The Commission then made the observation that the debenture holders in those two cases made no attempt to relate to the Commission "such claimed compensation to the value of the debentures and to establish that the debenture holders' interest in the companies as continuing enterprises were worth more than the face amount of the claim." In the instant case, however, the 1919 bondholders have repeatedly made such an attempt. The Commission apparently realized the futility of such figmentary distinctions and said:

> "The Commission does not regard these two earlier cases under Section 11 (e) as representing a complete answer to all cases dealing with prepayment of debt under Section 11. As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would

produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable. Consequently, in these later cases our opinions dealing with compulsory debt retirements under Section 11 have emphasized such circumstances, not articulated in the earlier cases, as the interest rate, maturity date, and risk factors incident to the particular security which is to be prepaid as bearing upon the fairness of the proposed discharge of the security."

It is patently observable from the record in the instant case that rights of the 1919 bondholders were dealt with in the archaic, rough-handed manner of the recanted concept, and not on the judicial basis of what is fair and equitable.

The Commission, however, was not permitted to dismiss the earlier cases that easily. It will be recalled that the courts on appeal based their reasoning on the doctrine of frustration. So in the American Power & Light Company case, it is said:

"American also relies heavily upon common law cases (also cited by us in our early two cases) involving frustration of contracts growing out of such diverse situations as termination of leases due to the passage of the Eighteenth Amendment, seizure by the government of a ship subject to charter, condemnation of a property by a municipality, etc. None of these cases involved a statute such as the Holding Company Act, which as we have previously pointed out, requires that, in a reorganization under Section 11, a security holder must receive the equitable equivalent of the rights surrendered by him and that such reorganization must not produce a windfall for one class of security holders at the expense of another. We do not believe these common law decisions arising in an entirely different context require us to

achieve inequitable results in Section 11 reorganizations."

While the Commission now denies in the American Power & Light case any potency to the frustration doctrine, it should be noted that the Commission relied on that very doctrine in the instant case. The District Court below likewise relied on the theory of frustration (R. p. 123).

The Commission having actually eviscerated the substance of its earlier two cases, then said:

> "We believe that any statements in our early opinions and in our briefs to the courts in such cases which could lead to the conclusion that 100 is payable under any or all circumstances should not be followed because of the obviously inequitable results that such a rule would produce."

The Circuit Court of Appeals in its opinion in this case holds that (R. p. 210):

> "The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the court."

As to relying on the expert skill of the Commission, the Court went on to say (R. p. 210):

> "The due date fixed in the contract in this case can not be urged, however, as the basis for a claim for interest payments."

Now, the Commission (the Court's denominated experts) say:

> "The pertinent rights include **the interest rate, the maturity date**, and all the other provisions of the contract." (Emphasis supplied.)

If the interest to maturity is a pertinent right in determining the fairness of a plan in one case, its import cannot be avoided in another case by the mere ostrich fashion and manner of refusing to even consider this pertinent right. The Circuit Court of Appeals and the District Court below failed to independently examine the question of fairness. This is obvious from the manner in which necessary factors were not taken into consideration, and also from the fact that false and forbidden factors (such as alleged impending bankruptcy) were taken into consideration. Implicit faith was given to the Commission's determination of fairness. The American Power & Light Company case, as we have here pointed out, reveals that the Commission in the instant case applied a concept of fairness which is not fair and is now repudiated and discredited by its promulgators and which indeed leads to inequitable and unconscionable results, as it has here done. Now that the Commission has abandoned the false concepts, the District Court should examine the question of fairness and should, as the very minimum, not feel itself bound by "expert opinion," which its creators say is false and not to be used.

At the present time a great deal of uncertainty exists in the market of operating public utility bonds because of the vacillating interpretation given by the Commission of its powers under Section 11 (b) (2) of the Act. Formerly, operating utility bonds were considered a relatively safe and stable form of investment. Investors who were primarily concerned with stability, such as the petitioner, invested in such securities. Now, however, such investments are fraught with insecurity because the Commission has, in some instances (and the Courts below in the present instance), so construed the Act as to render the contract's obligation virtually meaningless. This insecurity can be eliminated only by a final decision of this Court which will settle the question of whether or not the Commission can

in some instances impair these obligations while in other instances it can enforce such obligations, which obligations were entered into prior to the Act of 1935 and are protected by Sec. 26 (c) thereof.

The decision of the Circuit Court of Appeals is totally inconsistent and irreconcilable on the facts with the standard of fairness and equitableness as established by this Court in the full priority doctrine.

II.

The Circuit Court of Appeals Has Decided Four Important Questions of Federal Law Arising Out of the Public Utility Holding Company Act of 1935 Which Have Not But Should Be Settled by This Court.

(1) The Circuit Court of Appeals construed the Standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act authorizing the Securities and Exchange Commission "to require * * * that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary * * *" as not to apply "to the details of the plan" and held that that section did not require payment of redemption premuims on the 1919 bonds of Laclede Gas even though Laclede Gas continued as an operating company with sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow, pending court decision.

The Circuit Court of Appeals states that the standard of necessity in Section 11 (b) (2) "is not applicable to the details of the plan" but "provides only that the Commission must find the plan 'necessary' to effectuate a fair and equitable distribution of voting power among the security holders." This statement was made in connection with petitioner's contention that since Laclede

Gas had sufficient funds to pay the redemption premiums and had deposited such funds in escrow, it was not necessary to redeem the bonds without payment of premiums.

It needs no semanticist to be aware of the fact that Section 11 (b) (2) does not lend itself to the interpretation placed upon it by the Circuit Court of Appeals. Perhas it will be helpful to set out the applicable statutory language:

> "(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

It will be noticed that the word "necessary" appears twice in this subsection. The use of the word in the second instance is not significant here because it involves

a holding company ceasing to exist with respect to each of its subsidiary companies which themselves have a subsidiary company which is a holding company, a fact situation not here involved. The word is first used in that it is the duty of the Commission to require that "each registered holding company, and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system." This is hardly the place for an elementary review of the use of words, but that sentence certainly does not support the Court's conclusion that the subsection "provides **only** that the Commission must find the **plan** 'necessary' to effectuate a fair and equitable distribution of voting power." The subsection requires the Commission to find as necessary such **steps**. The word "steps" is not synonymous with the word "plan." The word "steps" is plural. It means all acts necessary to achieve the ends set out or to achieve the plan. That definitely involves a finding of necessity as to details. The Commission must **("shall" is used, which is mandatory)** find the **steps** necessary before it can order them to be done. If they are not necessary steps, then the Commission has no power to order them. Here the Commission had ordered the retirement of the 1919 bonds without payment of premiums. Therefore, such retirement without payment of premiums must be necessary to achieve the purposes of the subsection.

What the Circuit Court of Appeals has done is to transpose the word "necessary" and to endeavor to make it modify something that Congress did not say. Now, what are these necessary steps? They are not limited only to effectuate a fair and equitable distribution of the vot-

ing power. The steps must ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute the voting power among security holders. How is the step of retiring the 1919 bonds without payment of premiums necessary to achieve these purposes? It isn't, and it is obvious that, except for the payment of the sum now in escrow, no other feature of the plan, or in the corporate structure or in the voting power distribution, would be affected by the payment of the redemption premiums. The point here is that the standard of necessity does apply to the step of non-payment of premiums and that when applied it is plain that the retirement without payment of premiums is not necessary under the standards set forth in Sec. 11 (b) (2).

Moreover, the right to the redemption premiums (a sum in execess of a half a million dollars) is no mere detail to the 1919 Bondholders, the affected parties. The only point at which the bondholders can, in the first instance, receive a judicial determination of their rights is in an enforcement proceeding before the District Court. To have those rights sloughed off as inconsequential details renders meaningless any review granted. The implication of the Circuit Court of Appeals' position that the standard of necessity does not apply to details is that the Commission has no check whatsoever on it as to "details" so long as a plan is deemed necessary. Once it is decided that a plan is necessary, the Commission or the proponent of the plan could devise all sorts of details that would affect adversely and illegally the rights of others. Yet, under the ruling here such other persons could not question the details as unnecessary nor could they obtain judicial determination because the plan (and not the steps) had been held by the Commission to be necessary and the standard of necessity "is not applicable to the details of the plan."

Indeed the opinion of the Court of Appeals is a refutation of its conclusion. If the standard of necessity does not apply to details, neither the Commission, the District Court or the Court of Appeals need go into the question of the details or steps or discuss them. All that would be required under this theory would be a statement that the order of May 20, 1943 (even though not a final or appealable order, see Point III, infra) determined that a plan was necessary, ergo no necessity of discussing the "steps" or "details"; yet, the Commission, the District Court and the Circuit Court of Appeals found it necessary to go into details. Unless the statutory requirements are totally spurned, it is unavoidable that the "details" such as the retirement of the 1919 bonds must be considered and where rights are affected, as here, those rights must be judicially determined pursuant to applicable law.

As we have pointed out, the payment of the redemption premiums will in no way affect the other steps of the plan. The necessary funds are in escrow and except for this one step all other features of the plan have been put into effect. This step is not, therefore, necessary to effectuate any other provision of the plan. This is an important question of federal law affecting security holders of public utilities. It has not been settled by this Court, but it should be.

(2) **The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act to apply "only to security holders continuing as such in the reorganized corporation" and not to security holders existing in the Company up to the time of the consummation of the reorganization plan.**

The exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 provides as follows:

"Except for the purpose of fairly and equitably dis-

tributing voting power among the security holders, **nothing in this paragraph** shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public utility company."

Before the instant case, there was only one reported case dealing with Section 11 (b) (2) and an operating company. That case, In re Jacksonville Gas Co., 46 F. Supp. 852, involved a similar situation.

There a holding company, American Gas & Power Company, was being directed to divest its control of an operating company. The capital stock of the operating company had no equity in the company. The operating company was reorganized and new capital stock was distributed to the bond, debenture and note holders, and none to the stockholders. The Court there said, l. c. 856:

> "The present capital stock obviously has no equity in the company. Yet the holders of this stock now exercise the entire voting power—an obvious inequity within the meaning of Section 11 (b) (2) of the Act. **The voting power should be invested in the creditors who are now the real owners.**" (Emphasis supplied.)

And at l. c. 860:

> "* * * **The new stock is distributed amongst the present bond, debenture and note holders where it equitably belongs.** As American Gas & Power Company owns none of the present bonds, debentures or notes it will receive none of the new stock, and is thus deprived of its present control of Jacksonville Gas Company." (Emphasis supplied.)

The Jacksonville Gas Company case clearly states what is meant by "fairly and equitably distributing the voting power among the security holders." It means that the

voting power of such an operating company must be distributed to the then existing security holders in proportion to their equitable interests in the corporation. It does not mean that creditors can be eliminated contrary to their contracts and thereby deprived of this right. If the creditors are the real owners, then the voting power must be vested in them under the Act. The meaning of the exception clause found in Section 11 (b) (2) is perfectly clear. Now in the case of Laclede Gas there is one method whereby the stockholders can, legally and within the terms of the statute and the contracts, avoid the necessity of distributing the voting power to the bondholders, where it equitably belongs. The bonds provide for redemption upon the payment of redemption premiums. Consequently, the company can pay the premiums and redeem the bonds. If the bonds were so redeemed (and the bondholders could not object to such a contractual redemption) the voting power would not have to be distributed to the bondholders. But for the redemption provisions of the contracts, the voting power, under the clear language of the statute and the reasoning of the Jacksonville Gas Co. case, would have to be distributed to the real owners, the 1919 Bondholders.

The Circuit Court of Appeals in its opinion does not mention the Jacksonville Gas Company case, nor does it recognize at all the reasoning of that case. Instead, and by the use of jejune logomachy, it judicially legislates the exception clause of Section 11 (b) (2) so that the Circuit Court of Appeals has the section saying something that Congress did not say. While the Court of Appeals recognizes that "Laclede Gas is not a holding company and the bondholders are 'security holders of such company,'" it nevertheless contends that the voting power should not be distributed to the "security-holders of such company," but should be distributed to the **newly created**

security holders of the reorganized company at the expense of the then priority security holders. This Court says, "The term 'security holders,' as used in Sec. 11 (b) (2), can apply, therefore, only to security holders continuing as such in the reorganized company" (R. p. 218). In this manner the Court of Appeals has amended the exception clause of Section 11 (b) (2) to read as follows:

> "Except for the purpose of fairly and equitably distributing voting power among the **future** security holders **of the reorganized company (and not among the security holders existing at the time of the change of the corporate structure)**, nothing in the paragraph shall authorize the Commission to require any change in the corporate structure."

The emphasized portions of that sentence are what the Circuit Court of Appeals is actually adding to what Congress has said. Let us look at the effect of this judicially amended exception clause. The effect completely nullifies the meaning of the clause as it stood before amendment. The use of the word "The" before security holders has some meaning. The word "the" refers to particular object or objects, and is to be distinguished from the use of the word "a." Now before a plan is promulgated or effected, there are no security holders except those in existence, which in this case includes the 1919 bonds. It is these existing security holders that Congress had to mean for there are no other security holders the language used could apply to. To mean any other security holders the clause would have to be amended, and that is what the Court of Appeals endeavors to do. This judicially amended section gives the Commission an open field to tamper with the corporate structures of operating companies at will. Where Congress placed a definite restriction, the Commission can now make any sort of change in the corporate structure. It can eliminate classes of security holders

contrary to contractual rights and to the statute, but so long as other security holders who are not devastatingly demolished as security holders in the process receive the voting power, all will be well. It can not be forgotten that the **only** grounds upon which the Commission can require a change in the corporate structure of an operating company is for the **purpose** of fairly and equitably distributing the voting power among **the** security holders. "Purpose" means an object to be obtained, a result aimed at. Any change in the corporate structure must, to be justified, be a necessary step in obtaining the result aimed at, that is, the fair and equitable distribution of the voting power among the security holders. The Circuit Court of Appeals holds, however, that this is not so. Instead, the Commission can make any change in the corporate structure, and then after such change, it must distribute the voting power to the residual interests.

Under the reasoning of the Circuit Court of Appeals there is literally no change that the Commission could not effect in the corporate structure of an operating company. No restrictions remain. Under the power given the Commission by the Circuit Court of Appeals, the Commission has as much power to change the corporate structure of an operating company as Congress has given over holding companies.

This is an important federal question which affects the administration of the Public Utility Holding Company Act of 1935 and the interests of numerous security holders in operating public utilities. It has not been settled by this Court, but it should be.

(3) The Circuit Court of Appeals construes Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concudes that, therefore, the 1919 bondholders should be paid nothing above face value and accrued interest.

Before the Courts below the petitioner contended that the rights of the 1919 Bondholders should be determined by the interest they would receive to maturity except for the fact that they had entered into a contractual agreement whereby Laclede Gas could call the bonds before maturity upon payment of the redemption premiums, and that this contractual obligation was enforceable under Section 26 (c) of the Public Utility Holding Company Act of 1935. The Circuit Court of Appeals, however, took the position that "when the provisions of a contract are contrary to a new concept of public policy not foreseeable when the contract was made it becomes illegal and cannot be enforced" (R. p. 319), and, therefore, held that the 1919 Bondholders could not receive more than face value plus accrued interest.

It is submitted that this position totally fails to recognize the nature of Section 26 (c) and the contract here involved. In the first place the contract provision giving Laclede Gas the right to redeem the bonds before maturity is in derogation of the interests of the 1919 Bondholders. Without such a provision the 1919 Bondholders would be entitled to over $4,000,000 in interest to maturity. But, with such a provision the 1919 Bondholders, by their own contractual act, are limited to $570,000. If the redemption provision of the contract is illegal and non-enforceable, then it should not enter at all into the determination of what is fair and equitable treatment of these Bondholders. Instead of the $570,000 redemption premiums the fair and equitable treatment of the 1919 Bondholders should be

measured by the amount of interest they would receive to maturity, which is in excess of $4,500,000. In other words, fairness and equitableness should be measured by what the 1919 Bondholders would receive in interest to maturity. But, even though they ought to receive more than $570,000 that is the limit they can claim because they have contracted that the bonds might be redeemed upon paying premiums in that amount. That is the petitioner's position. Of course if the Circuit Court of Appeals is right, the 1919 Bondholders are not limited by their contract and they should receive complete compensation for the senior rights they are surrendering even though it exceeds $570,000. The 1919 Bondholders, however, have not tried to avoid their contractual obligations. They believe that the contracts which restrict and limit their rights is valid.

It is worth noting the position of the Commission in In the Matter of American Power & Light Company, CCH Federal Securities Law Service, Par. 75,592, which was decided after the Circuit Court of Appeals filed its opinion (but before the Petition for Rehearing, at which time it was called to the Court's attention, R. p. 253). In that case the Commission took the position that the call provision was not applicable except for the purpose of establishing a maximum price. The Commission went on and said: "The pertinent rights of the debentures which should be satisfied under Section 11 (e) must therefore be ascertained by reference to the remaining provisions of the contract. These rights include the interest rate, the maturity date, and all other provisions of the contract." The interpretation given by the Commission there is precisely that of the petitioner here.

Because the petitioner believes that its contractual obligations are valid and that the act should not be perverted, it is now placed in the anomalous position of ar-

guing for the maintenance of a provision that limits its rights. The concept which the Circuit Court of Appeals promulgates is not the policy enunciated by Congress. Section 26 (c) states "**Nothing in this title** shall be construed (1) to affect the validity of any loan or extension of credit * * * made or of any lien created prior or subsequent to the enactment of this title." That language is clear and ambiguous. The word "nothing" is not a weak word. Webster's New International Dictionary defines it thus: "Not anything; no thing (in the widest sense of the word thing); nought." It will be noticed that nothing applies to the whole title, the whole Act. The announced public policy (the new concept) of Congress is that no thing (in the widest sense of the word thing) in the entire Act "shall be **construed** (1) to affect the validity of any loan." Now the use of the word "construed" is significant because it means "to put a construction upon; to explain the sense or intention of." Since the Commission and the Courts are given power under the Act to apply and enforce it, Congress is thus telling them that they shall construe the Act so that nothing in the entire Act shall affect the validity of any loan. This is the "new concept" in that it controls the whole Act. There is nothing in the enforcement of the redemption provision of the contract which produces results at variance with the legislative policy. On the other hand, the construction of the Circuit Court of Appeals that the contracts are "illegal and cannot be enforced" does produce results at variance with the legislative policy as expressed in Section 26 (c) of the Act. Section 26 (c) of the Act must have some meaning. It is not to be presumed that Congress indulged in enacting meaningless and useless verbiage. The language at the Section is clear and its meaning is plain. Yet, the interpretation and construction given Section 26 (c) by the Circuit Court of

Appeals renders the section meaningless, it is an attempt by that court to overrule the manifest policy of Congress.

Section 26 (c) of Act, by its terms, was intended to protect extensions of credit or loans made prior to the enactment of the Act. This express intent of Congress renders the rulings of the Commission, the District Court and the Court of Appeals particularly deleterious because the securities here were issued long prior to the enactment of the Act. It was precisely this type of security that Congress intended to protect and did so protect by Section 26 (c), yet the Commission and the Courts below refuse to apply this clear Congressional command.

This is not a case of impossibility of performance or of frustration, as is found in those instances involving bondholders of a holding company where the holding company is ordered out of existence. Even the doctrine of frustration has been discredited as to holding companies by the Commission in the matter of American Power & Light Company, CCH Fed. Securities Law Service, Par. 75,592, where the Commission, referring to the frustration cases (which the Commission had previously relied upon), said that such decisions do not "require us to achieve inequitable results in Section 11 reorganizations." In any event the doctrine of frustration is not applicable here because Laclede Gas is continuing as an operating company. It has ample funds to pay more than the redemption premiums, and has in fact, as required by the plan, deposited in escrow funds sufficient to pay the premiums pending judicial determination of the right of the bondholders to the premiums. This is not a case of impossibility of performance or frustration. Laclede Gas is a continuing operating company. It has ample funds to pay more than the redemption premiums, and has in fact deposited in escrow funds sufficient to pay the premiums.

This Court has not settled the question of the applica-

tion of Section 26 (c) to continuing operating companies, but it should because it is an important federal question which affects the administration of the Public Utility Holding Company Act of 1935 and the interests of numerous security holders in operating public utilities.

(4) **The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 as required by Section 11 (e) of the Act. The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question.**

Section 11 (e) of the Public Utility Holding Company Act of 1935 provides that the Commission, after it approves a plan "at the request of the Company, may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may (enforce the order) * * *."

The District Court failed to exercise the independent judgment required of it by Section 11 (e). Instead it completely accepted and felt itself bound by the conclusions of the Commission as to whether the plan was fair and equitable and appropriate to effectuate the provisions of Section 11.

Some examples of the Court's abdication of its duties to the Commission are as follows:

The Court found as a conclusion of law (Conclusion No. VII, R. p. 134):

> "Since the finding of the Commission that the payment of the 1919 Bonds, as provided in the plan, without premium, is the fair equivalent of the rights of the 1919 bondholders was supported by substantial evidence before the Commission, that finding is conclusive in this proceeding."

It also found as a conclusion of law (Conclusion No. VI, R. p. 134):

> "Since the finding of the Commission that the payment of the 1919 Bonds without premium will not be a voluntary redemption on the part of Laclede Gas was supported by substantial evidence before the Commission, that finding is conclusive in this proceeding."

In its opinion the Court stated (R. p. 113):

> "The Commission found the plan was 'entirely appropriate' to comply with its orders. There are matters peculiarly within the discretion and powers of the Commission, and if based on evidence, we deem this Court bound by the finding."

Perhaps the extent of the reverence the Court had for the Commission is best illustrated in that portion of its opinion where the Court took the position that the Commission could exceed its powers as long as it made appropriate findings. The Court said (R. p. 121):

> "Orders otherwise beyond the powers of the Commission become valid, when based upon appropriate finding by the Commission."

Section 11 (e) of the Act requires the Court to find that a plan submitted by a company pursuant to that section is fair and equitable and appropriate to effectuate the provisions of the section before the Court can issue an enforcement order. This sub-section is unlike Section 11 (d), which provides for automatic enforcement of plans initiated by the Commission, i. e., it does not require the

Court to determine whether the plan is fair and equitable. Now, the fact that Congress saw fit to require such a determination by the Court in Section 11 (e) and did not require such a determination in Section 11 (d) shows that Congress intended the Court to determine independently the fairness and equitableness and the appropriateness of the plan, and not to blandly accept the Commission's statements as binding. The Commission recognized this necessity when in its Supplements Findings and Order approving the Plan it said:

> "However, inasmuch as the plan is not to be carried out except in accordance with an order of an appropriate federal district court, our order will be in such terms that it will not be operative to authorize the Commission of the transactions therein provided until such court shall * * * enter an order enforcing the plan" (R. pp. 64-65).
>
> "That this order shall not be operative to authorize the consummation of transactions proposed in the plan as amended until an appropriate federal district court shall, upon application thereto, enter an order enforcing such plan" (R. p. 71).

This condition was carried forward in order of December 2, 1944, approving the plan as amended November 16, 1944 (R. p. 154).

In reviewing the acts of administrative agencies, the courts must determine whether, in interpreting or applying statutes, an administrative agency has applied the proper criteria, whether its judgment is erroneous as a matter of law and whether there is statutory authority for the act of the agency.

In connection with the enforcement procedure, the Report of the Committee on Administrative Procedure appointed by the Attorney General, Senate Document No. 8, 77th Cong. 1st Ses., said at l. c. 82:

> "Statutory review.—Statutes creating administra-

tive tribunals generally provide methods by which their determinations may be judicially reviewed. In this way a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the Interstate Commerce Commission other than a suit by the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938 and is true today of the National Labor Relations Act. The statutes differ as to the weight to be attached to the administrative findings, the courts in which enforcement is to be sought and the process by which judicial aid is to be invoked. These matters will be discussed below. **The point here is that by this method, administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority.**" (Emphasis supplied.)

The same document points out (at l. c. 87-88) that the determination of the meaning of words is a judicial function:

"Thus the Supreme Court has held that what is an 'unfair method of competition' under the Federal Trade Commission Act is ultimately a question for the courts. Again, whether an employer is engaged in a business so related to interstate commerce that he is subject to the National Labor Relations Act is a question for the courts, as are also the questions, for example, whether an employer's refusal to put his agreement in writing can be an unfair labor practice under the Act and whether the National Labor Relations Board may order the hiring of a person whom the prospective employer has refused to hire because of his union affiliation. **Whether the factors upon which the administrative decision was based are such as the agency is permitted to consider and whether the fac-**

tors which it rejected are attached to various factors are all questions which the courts can review as questions of law." (Emphasis supplied.)

In Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, this Court said at l. c. 520:

> "On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, **the court was in no position to exercise the 'informed, independent judgment'** (National Surety Co. v. Coriell, 289 U. S. 426, 436, 77 L. ed. 1300, 1305, 53 S. Ct. 678, 88 A. L. R. 1231), **which appraisal of the fairness of a plan of reorganization entails.** Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 84 L. ed. 110, 60 S. Ct. 1, Am. Bankr. Rep. (NS) 110. And see First Nat. Bank v. Flershem, 290 U. S. 504, 525, 78 L. ed. 465, 478, 54 S. Ct. 298."

In Federal Trade Commission v. Gratz, 253 U. S. 421, the Federal Trade Commission, after hearing, held that respondents had engaged in "unfair methods of competition." The Federal Trade Commission Act provided that the Commission could apply to the designated Circuit Courts of Appeal for an order to enforce a cease and desist order issued by the Commission. The Act also provided that the findings of the Commission as to the facts, if supported by testimony, would be conclusive. In that case the Commission applied for an enforcement order. This Court held that it was for the Court to determine what was meant by "unfair method of competition," and said at l. c. 427:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include."

In the instant case the District Court felt itself bound by the Commission finding of the fair equivalent of the

rights of the 1919 bondholders (R. p. 134). The court cannot be bound by the Commission's determination of what is fair and equitable or what is appropriate to effectuate the provisions of the Act.

When Congress establishes statutory standards and provides judicial review, the court must see that those statutory standards are applied. The Supreme Court said in United States v. Carolina Carriers Corp., 315 U. S. 475, 489:

> "Congress has prescribed statutory standards pursuant to which * * * rights are to be determined. Neither the court nor the (Interstate Commerce) Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. **Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards.** If that inquiry is bolted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'pre-requisite to the operation of its statutory command.' * * * Hence that requirement is not a mere formal one. Only when statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." (Emphasis supplied.)

As to the District Court's statement that "Orders otherwise beyond the power of the Commission become valid, when based upon appropriate finding by the Commission,"

we find it extremely difficult to believe that the Court could really mean such a statement. Yet that statement reveals the frame of mind that permeated the Court's treatment of the questions before it. For that statement the Court cites Securities & Exchange Commission v. Chenery Corporation, 318 U. S. 80, as authority. Nothing in that case could conceivably justify such a broad statement. As a matter of fact the Court there said at l. c. 94-95:

> "But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, **an order may not stand if the agency has misconceived the law.** In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Bd., 313 U. S. 177, 197, 85 L. Ed. 1271, 1284, 61 S. Ct. 845, 133 A. L. R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 488-490, 86 L. ed. 971, 982, 983, 62 S. Ct. 722. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. **We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.**" (Emphasis supplied.)

The petitioner's objection against the failure of the District Court to exercise its independent judgment was dismissed by the Circuit Court of Appeals as being "without merit". As we showed earlier in this brief, the District Court and the Circuit Court of Appeals misconstrued and misapplied the standard of fairness as established by this Court in the full priority doctrine. Nor did these courts consider factors which the Commission now (in In the Matter of American Power & Light Company, CCH Federal Securities Law Service, Par. 75,592, discussed supra under Point I [3]) considers to be necessary if a result "contrary to the Congressional intention manifest in Section 11" is to be avoided. If Section 11 (e) is interpreted to mean that the District Court is not required to independently determine whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11, then that section has no meaning. This is an important federal question which affects the administration and enforcement of the Public Utility Holding Company Act of 1935 and the rights, particularly their right to judicial review, of numerous security holders in public utilities. This question has not been settled by this Court, but it should be.

III.

The Holding of the Circuit Court of Appeals That the Order of the Commission of May 20, 1943, Is Final Is In Conflict With Decisions by Circuit Courts of Appeal for the Second and Third Circuits.

On May 20, 1943, the Commission entered an Order (R. pp. 85-89) which in no way indicated that the 1919 bonds should be retired. The Order did direct Ogden to eliminate itself as a public utility holding company. As to Laclede Gas, the Order merely provided that it should "take such steps as may be necessary to recapitalize so as to distribute voting power fairly and equitably among

the security holders" and that the recapitalization of Laclede Gas should include a "substantial reduction of the debt, the elimination of preferred stock arrears, and the conversion of its outstanding preferred and common stock into a single class of stock".

The District Court, as a conclusion of law (Conclusion of Law IV, R. p. 133), found that the Order of May 20, 1943, "is not reviewable by this court because, under section 24 (a) of the Act, such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired". In its opinion the District Court said (R. p. 110), "Let not the effect on this case of the finality of the findings and order in the consolidated case be overlooked * * * no appeal having been taken by them in the consolidated case and, time for appeal having expired, it is a matter of serious doubt whether they are now in a position to complain of findings and orders in the consolidated case, which are now in this case if made to carry out the provisions of the order made by the Commission in the consolidated case". The Circuit Court of Appeals did not reverse the District Court on this interpretation of the appealable nature and the ramifications of the Order of May 20, 1943. It accepted the District Court's position that the Order was not appealed from and is now final (R. p. 209).

If the order of May 20, 1943 were an appealable order as to the issues here involved, why did the Commission provide that the plan approved should not be effective until an enforcement order was entered by the District Court?

Nothing in the Order of May 20th, 1943, could possibly be construed as directing the retirement of the 1919 bonds. A substantial reduction of Laclede Gas' debt could have been effected in any number of ways without the retirement of the 1919 bonds. This, the Commission

(R. p. 44) and the trial court (R. p. 116) recognized. The Order of May 20, 1943, did not adversely affect, or affect at all for that matter, the rights or interests of the 1919 Bondholders. The Bondholders could not have conceivably guessed that Ogden or Laclede Gas would subsequently propose a retirement of the bonds without payment of premiums. Even if this proposal could have been clairvoyantly foreseen, there was nothing the Bondholders could have done. They were not, by the terms or by the necessary effect of the Order of May 20, 1943, adversely affected. It is, of course, well established law that unless a person is adversely affected by an administrative determination, he has no grounds upon which to challenge that determination. For this reason the appellants herein could not appeal from the Order of May 20, 1943. The rule is laid down in Sixth Circuit in Detroit Edison Co. v. Securities & Exchange Commission, 119 F. (2d) 730, 740, thus:

> "The petitioner has asked for a declaration of status under the provisions of the statute. This is incompatable with a challenge to its validity. The party who invokes the power to review and annul Acts of Congress must be able to show that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement. Until some order of the Commission adversely affects the petitioner a challenge to constitutional validity is premature. City of Allegan v. Consumers' Power Company, 6 Cir., 71 F. 2d 477; East Ohio Gas Company v. Federal Power Commission, 6 Cir., 115 Fed. 2d 385."

In Commonwealth & Southern Corp. v. Securities & Exchange Commission, 134 F. (2d) 747, the SEC had issued a simplification order. The Company sought to appeal from the order, and, among other grounds, contended that the order violated the Fifth Amendment. The Court held that the point was prematurely raised and that the proper

place to raise the issue was in an enforcement proceeding, where objections could be made in so far as the plan affected their rights. The Court said at l. c. 753:

> "It is suggested by Commonwealth that the order is also in violation of the Fifth Amendment with respect to its stockholders, since it directs an alteration in their rights without their consent and without their having been heard. But without granting its validity, we think that this point is premature. The order now under review, as we have pointed out, is primarily designed to enable Commonwealth to comply with the mandate of the law by obtaining the voluntary co-operation of its stockholders. If they do thus co-operate and adopt a plan which complies with the Commission's order, obviously no question of want of due process can arise. On the other hand, if a voluntary readjustment cannot be consummated **and it becomes necessary to make applications to a district court for the enforcement under sections 11 (d) or 11 (e) of a plan proposed by the Commission or the Company the stockholders will have an opportunity to assert in the district court any objections, including want of due process, which they may have to the plan presented in so far as it affects their rights.**" (Emphasis supplied.)

Even where rights of security holders, such as the 1919 Bondholders are affected by an order, such as the one of May 20, 1943, the only proper place to raise objections is in an enforcement proceeding before the District Court. It has been clearly established that, even where rights are affected, an appeal cannot be made by security holders pursuant to Section 24 (a) of the Act for the reason that such orders are not appealable or final orders. Lownsbury et al. v. Securities and Exchange Commission et al., 151 F. (2d) 217 CCH, Federal Securities Law Service, Paragraph 90,322 (CCA 3rd). The facts in the Lownsbury case were as follows:

The case arose on a motion by the Securities and Ex-

change Commission to dismiss the petition of certain stockholders of The Commonwealth & Southern Corporation for review of two orders of the Commission. The question presented to the Court was whether the Circuit Court of Appeals was the proper forum to test the Commission's orders pursuant to Section 24 (a) of the Act, as contended by the stockholders, or whether the District Court was the proper forum pursuant to an enforcement proceeding under Section 11 (e), as contended by the Commission. It was observed that the orders of the Commission were "expressly stated not to be deemed operative to authorize any of the transactions contemplated by the plan until a District Court has entered an order enforcing the plan".

The Circuit Court of Appeals for the Third Circuit held that such orders were not reviewable under Section 24 (a), but that they were reviewable only in an enforcement proceeding under Section 11 (e). It adopted the contention of the Commission that such orders were interlocutory orders.

Judge Briggs, in his concurring opinion in the Lownsbury case, pointed out that "There may be in fact no definite 'plan' in the Commission's mind when it makes orders of divestment". That certainly was the case when the Commission issued the order of May 20, 1943, because the Commission directed future steps to be taken to perfect a plan—meaning that there were alternative methods, as has been recited by the Commission and the District Court. Moreover the Commission states this is not the only method by which the divestiture could be accomplished (R. p. 44).

As pointed out in the Lownsbury case, supra, the Second Circuit ruled in the same way in Okin v. Securities and Exchange Commission, 145 F. (2d) 206, as the Third Circuit did in the Lownsbury case.

From the Lownsbury case and the other cases, it is

patent that petitioner could not appeal from the order of May 20, 1943. The only forum in which they could object was in the enforcement proceeding of the specific plan subsequently approved and made effective only after an enforcement order. Yet, the Court of Appeals and the District Court below hold that the petitioner cannot raise objections in an enforcement proceeding because the order of May 20, 1943, was unappealed from and became final—even though the question of non-payment of redemption premiums was not considered, nor could it be considered because the plan so proposing had not been submitted to the Commission. The holding is in direct conflict with holdings in both the Second, Third and Sixth Circuits.

CONCLUSION.

For the reasons stated, a writ of certiorari should be issued out of this Court to review the judgment entered herein by the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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